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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

NO. 750.

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI, *Petitioner*,

vs.

STATE OF MISSOURI, AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT'S BRIEF IN OPPOSITION TO ISSUANCE OF WRIT.

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I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not been as yet officially reported, but may be found in 144 S. W. (2d) 106, and also appears at pages 42 to 48 of the record in this cause.

II.

STATEMENT OF THE CASE.

Section 5678 of the Revised Statutes of Missouri, 1929, provides that the Attorney General shall be the legal adviser of the Superintendent of the Insurance Department, but that said Superintendent may, with the approval of the Governor,

employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions.

Section 5679 of said Statutes provides that all the expenses of the Insurance Department, except certain expenses not material to the issues herein, shall be paid out of the amount appropriated by law from the fees collected by the Insurance Department. Provision is made in the statutes for the payment of fees into the Insurance Department fund out of which appropriations for the expenses of the Insurance Department are to be made.

(All of the pertinent statutes herein referred to are set out in Appendix B, at page 26 of Petitioner's brief, and are not, therefore, set out again in Respondent's brief.)

Petitioner Weatherby filed a suit in the Circuit Court of Cole County, Missouri, alleging that on December 1, 1930, he had been employed by the Superintendent of the Insurance Department of Missouri, with the approval of the Governor, as counsel to assist in the defense of a rate review suit and to save, preserve and recapture such increased premiums as the policyholders had paid into court in connection with said suit (R. 6). His petition also alleged that he had faithfully performed his services in connection with his employment and that the defense of said action resulted in defeating the proposed increase of rates, and that thereby there was saved, preserved and recaptured for the policyholders the entire impounded fund amounting to approximately $1,650,000 (R. 6, 7). Said petition also alleged that the funds thus saved, preserved and recaptured should be made to bear the expense of its recovery, including attorney's fees (R. 7), and prayed the court to fix and determine the reasonable value of petitioner's services as an attorney in said rate review case, and to impress said allowance as a lien upon said impounded fund.

The Superintendent of the Insurance Department filed in the Supreme Court of Missouri an application for a writ of prohibition directed against the Circuit Court in which the petition of said Weatherby was pending, said Superintendent contending that the said Circuit Court was without jurisdiction and authority to allow the petitioner Weatherby a fee out of the impounded fund and to impress a lien upon said fund in his favor (R. 1). Upon a hearing of said prohibition case

the Supreme Court of Missouri made its preliminary rule in prohibition absolute, thus preventing the Circuit Court of Cole County, Missouri, from entertaining petitioner's action for an attorney fee out of the impounded funds.

In its opinion the Missouri Supreme Court held that petitioner Weatherby had been employed under statutes of said state which provided a method for his payment (R. 47), and that therefore he had no claim against the impounded fund upon which he was seeking to impress a lien (R. 48). The opinion held that the Circuit Court of Cole County did not have jurisdiction to impress a lien upon the policyholders' funds in favor of petitioner Weatherby because no such lien existed, said Circuit Court being bound by statutory limitations placed on the power of the Superintendent of Insurance in making the contract of employment with petitioner Weatherby.

III.

SUMMARY OF ARGUMENT.

The points respondent urges on this Court are in summary form as follows:

I. The decision of the Supreme Court of Missouri as to the meaning of the Insurance Code of that state is binding upon this Court.

II. Petitioner Weatherby was not employed by policyholders interested in the fund upon which he seeks to impress a lien, but he was employed by the Superintendent of the Insurance Department of Missouri under statutory authority, which statutes, including the method of payment, became a part of the contract of employment.

III. The regulation of insurance business by the State of Missouri is a proper exercise of its police power.

IV. The Fourteenth Amendment to the United States Constitution is not violated by reasonable restraints upon the right to contract.

ARGUMENT.

POINT I.

The decision of the Supreme Court of Missouri as to the meaning of the Insurance Code of that state is binding upon this Court.

The case of *Hartford Accident Co.* vs. *Nelson Co.*, 291 U. S. 352, 358, announces the well established rule that the interpretation of a statute of a state by the courts of last resort of that state is binding upon this Court. In fact, petitioner concedes (P. 6, Brief) that the Missouri Supreme Court could construe its own statutes, but insists that said statutes as so construed are unconstitutional.

POINT II.

Petitioner Weatherby was not employed by policyholders interested in the fund upon which he seeks to impress a lien, but he was employed by the Superintendent of the Insurance Department of Missouri under statutory authority, which statutes, including the method of payment, became a part of the contract of employment.

The opinion of the Missouri Supreme Court held (R. 47) that petitioner Weatherby was not employed by a group of individuals, to-wit, the policyholders interested in the rate reduction, but that he was employed by the Superintendent of Insurance of Missouri under authority of statutes which provided under what conditions special counsel could be employed and in what manner such counsel could be paid. Said opinion also held (R. 46) that the statutes of Missouri expressly provided how all expenses of the Insurance Department of Missouri should be paid, and that the payment to petitioner for his services under his contract of employment was one of the expenses so provided for. This interpretation of the statutes of Missouri by its court of last resort being binding upon this Court, the only question before this Court is whether the State of Missouri could enact statutes which provided how petitioner could be employed by the State and how he could be paid. In other words, did petitioner Weatherby have a

right under the Fourteenth Amendment to the Constitution of the United States to be employed by the State in a certain way and to be paid in a certain manner, which right the State could not by statute abolish?

Said petitioner admitted that he was employed by the Superintendent of Insurance by virtue of certain statutes of the State (R. 6). The Missouri Supreme Court held that the statutes authorizing his employment and providing for his payment became a part of his contract of employment, the court using the following language (R. 47):

> "The attorney was not employed by the policyholders. He was employed by the superintendent under his statutory powers, which statutes, including the method of payment, became a part of the contract of employment."

Petitioner claims that he has been denied due process by being denied the right to contract with the representative of the policyholders in a normal way. We submit that petitioner could not have been employed by the representative of the policyholders had not such representative been authorized by statutes to employ him. He was employed by virtue of statutes, and the question now is whether he can accept employment by the State under a contract which provides for his compensation in a certain manner and then claim that if he is not allowed to seek other compensation than that provided by his contract of employment, he is denied due process of law and equal protection of the law.

The cases cited by petitioner in his brief are not in point for the reason that the attorneys in those cases were not employed under statutes which provided for their compensation in a particular manner. Petitioner's situation is not the same as an attorney who contracts with private individuals, against whom the law would imply certain obligations. He was employed by the State of Missouri under statutes which provided both the method of his employment and the method of his payment. He was not denied the right to contract. He did contract in accordance with the statutes of the State of Missouri, and he cannot complain that the State did not authorize its officer, the Superintendent of Insurance, to provide different methods of payment than the statutes set out. The statutes were in force before petitioner accepted

his employment, and if he elected to accept employment under them, he must abide by the terms of his employment as outlined in said statutes.

POINT III.

The regulation of insurance business by the State of Missouri is a proper exercise of its police power.

The case of *German Alliance Ins. Co.* vs. *Hale*, 219 U. S. 307, 316, is authority for the proposition that the regulation of insurance business, and particularly the matter of the determination of rates, is a proper subject for the exercise of the police power of a state. To the same effect is the case of *German Alliance Ins. Co. vs. Kansas*, 233 U. S. 389. It must follow, therefore, that if the State of Missouri has the right to regulate insurance business and to control the fixing of rates charged the public, the statutes of Missouri which authorized its Insurance Department to employ petitioner to enforce the statutes of the state regarding insurance rates are constitutional. If the State has the right to provide for the employment of attorneys to help enforce the insurance laws, it would certainly have the right to provide how such attorneys shall be paid.

If counsel employed by a State could have a lien on the proceeds of litigation conducted by the State, then the State would lose its control of such litigation since counsel would have such an interest in the outcome of the litigation that they could say whether such litigation should be abandoned or should be carried on in a particular manner. In such a situation the State would be thwarted in the exercise of its police power and other functions since it would not have control of the enforcement of such power and functions but would have to divide such control with attorneys claiming a lien upon the outcome of the litigation. In other words, if the State should determine that it should abandon a rate review suit, it could not do so because its attorneys would claim that they had a contingent interest in the outcome of such a suit. It, therefore, appears evident that the State must have the right to provide how attorneys employed by it shall be paid in order that it may control litigation in which it is interested.

The Supreme Court of Missouri has held that the enactment of the Insurance Code of that state indicated an intention on the part of the General Assembly to regulate the insurance business from beginning to end, thereby protecting individual and public interests (*State ex rel. Missouri State Life Ins. Co.* vs. *Hall*, 330 Mo. 1107, 1116, 52 S. W. (2d) 174, 177), and this holding was approved in the case objected to by petitioner here (R. 44).

POINT IV.

The Fourteenth Amendment to the United States Constitution is not violated by reasonable restraints upon the right to contract.

In the case of *Hardware Dealers Mutual Fire Ins. Co.* vs. *Glidden Co. et al.*, 284 U. S. 151, 157, this Court held that reasonable restraints upon the right to contract do not violate the Fourteenth Amendment. Likewise, in the case of *Barbier* vs. *Connolly*, 113 U. S. 27, 31, this Court held that the Fourteenth Amendment was not designed to interfere with the exercise of the police power by a state.

Petitioner Weatherby was not deprived of his right to contract, and the only restriction on his right to contract with the State of Missouri was that if he did so contract, he should be paid in the manner that the state law provided. Such provisions as to his contract were the same as the provisions for all others similarly contracting with the State, and therefore petitioner was not denied the equal protection of the law by reason of such statutes.

CONCLUSION.

We respectfully submit that petitioner has not been denied the right to contract and has not been denied due process of law, but that he is seeking to obtain compensation other than that provided by his contract of employment. It is not the denial of due process or of equal protection of the law to hold a man to his voluntary contract, and the petitioner, who has accepted employment under statutes of a state which provide for his compensation, should not be heard to complain that he cannot be paid in the same manner as an attorney who contracts with a private individual.

Respectfully submitted,

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